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**HOUSE BILL 783**

**47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005**

**INTRODUCED BY**

**Brian K. Moore**

**AN ACT**

**RELATING TO CRIMINAL SENTENCING; REQUIRING PARTICIPATION IN A  
SEX OFFENDER TREATMENT PROGRAM AS A CONDITION OF PROBATION FOR  
SEX OFFENDERS; ELIMINATING LIMITATIONS ON USE OF PRIOR FELONY  
CONVICTIONS FOR HABITUAL SEX OFFENDERS.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:**

**Section 1. Section 31-18-17 NMSA 1978 (being Laws 1977,  
Chapter 216, Section 6, as amended) is amended to read:**

**"31-18-17. HABITUAL OFFENDERS-- ALTERATION OF BASIC  
SENTENCE. --**

**A. A person convicted of a noncapital felony in  
this state whether within the Criminal Code or the Controlled  
Substances Act or not who has incurred one prior felony  
conviction that was part of a separate transaction or  
occurrence or conditional discharge under Section 31-20-13 NMSA**

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1 1978 is a habitual offender and his basic sentence shall be  
2 increased by one year. The sentence imposed pursuant to this  
3 subsection shall not be suspended or deferred, unless the court  
4 makes a specific finding that the prior felony conviction and  
5 the instant felony conviction are both for nonviolent felony  
6 offenses and that justice will not be served by imposing a  
7 mandatory sentence of imprisonment and that there are  
8 substantial and compelling reasons, stated on the record, for  
9 departing from the sentence imposed pursuant to this  
10 subsection.

11 B. A person convicted of a noncapital felony in  
12 this state whether within the Criminal Code or the Controlled  
13 Substances Act or not who has incurred two prior felony  
14 convictions that were parts of separate transactions or  
15 occurrences or conditional discharge under Section 31-20-13  
16 NMSA 1978 is a habitual offender and his basic sentence shall  
17 be increased by four years. The sentence imposed by this  
18 subsection shall not be suspended or deferred.

19 C. A person convicted of a noncapital felony in  
20 this state whether within the Criminal Code or the Controlled  
21 Substances Act or not who has incurred three or more prior  
22 felony convictions that were parts of separate transactions or  
23 occurrences or conditional discharge under Section 31-20-13  
24 NMSA 1978 is a habitual offender and his basic sentence shall  
25 be increased by eight years. The sentence imposed by this

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1 subsection shall not be suspended or deferred.

2 D. As used in this section, "prior felony  
3 conviction" means:

4 (1) a conviction, when less than ten years  
5 have passed prior to the instant felony conviction since the  
6 person completed serving his sentence or period of probation or  
7 parole for the prior felony, whichever is later, for a prior  
8 felony committed within New Mexico whether within the Criminal  
9 Code or not, but not including a conviction for [~~a felony~~  
10 ~~pursuant to the provisions of~~]:

11 (a) driving under the influence of  
12 intoxicating liquor or drugs or aggravated driving under the  
13 influence of intoxicating liquor or drugs, as provided in  
14 Section 66-8-102 NMSA 1978; [~~or~~]

15 (b) criminal sexual penetration in the  
16 first, second, third or fourth degree, as provided in Section  
17 30-9-11 NMSA 1978;

18 (c) criminal sexual contact of a minor  
19 in the second, third or fourth degree, as provided in Section  
20 30-9-13 NMSA 1978;

21 (d) sexual exploitation of children, as  
22 provided in Section 30-6A-3 NMSA 1978;

23 (e) sexual exploitation of children by  
24 prostitution, as provided in Section 30-6A-4 NMSA 1978;

25 (f) kidnapping, as provided in Section

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1 30-4-1 NMSA 1978, when the victim is less than eighteen years  
2 of age and the offender is not a parent of the victim;

3 (g) false imprisonment, as provided in  
4 Section 30-4-3 NMSA 1978, when the victim is less than eighteen  
5 years of age and the offender is not a parent of the victim;

6 (h) aggravated indecent exposure, as  
7 provided in Section 30-9-14.3 NMSA 1978;

8 (i) incest, as provided in Section  
9 30-10-3 NMSA 1978, when the victim is less than eighteen years  
10 of age; or

11 (j) solicitation to commit criminal  
12 sexual contact of a minor in the second, third or fourth  
13 degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978;  
14 or

15 (2) a prior felony, when less than ten years  
16 have passed prior to the instant felony conviction since the  
17 person completed serving his sentence or period of probation or  
18 parole for the prior felony, whichever is later, for which the  
19 person was convicted other than an offense triable by court  
20 martial if:

21 (a) the conviction was rendered by a  
22 court of another state, the United States, a territory of the  
23 United States or the commonwealth of Puerto Rico;

24 (b) the offense was punishable, at the  
25 time of conviction, by death or a maximum term of imprisonment

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1 of more than one year; or

2 (c) the offense would have been  
3 classified as a felony in this state at the time of conviction.

4 E. As used in this section, "nonviolent felony  
5 offense" means application of force, threatened use of force or  
6 a deadly weapon was not used by the offender in the commission  
7 of the offense."

8 Section 2. Section 31-20-5.2 NMSA 1978 (being Laws 2003  
9 (1st S.S.), Chapter 1, Section 7) is amended to read:

10 "31-20-5.2. SEX OFFENDERS--PERIOD OF PROBATION--TERMS AND  
11 CONDITIONS OF PROBATION.--

12 A. When a district court defers imposition of a  
13 sentence for a sex offender, or suspends all or any portion of  
14 a sentence for a sex offender, the district court shall include  
15 a provision in the judgment and sentence that specifically  
16 requires the sex offender to serve an indeterminate period of  
17 supervised probation for a period of not less than five years  
18 and not in excess of twenty years. A sex offender's period of  
19 supervised probation may be for a period of less than twenty  
20 years if, at a review hearing provided for in Subsection B of  
21 this section, the state is unable to prove that the sex  
22 offender should remain on probation. Prior to placing a sex  
23 offender on probation, the district court shall conduct a  
24 hearing to determine the terms and conditions of supervised  
25 probation for the sex offender. The district court may

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1 consider any relevant factors, including:

2 (1) the nature and circumstances of the  
3 offense for which the sex offender was convicted or  
4 adjudicated;

5 (2) the nature and circumstances of a prior  
6 sex offense committed by the sex offender;

7 (3) rehabilitation efforts engaged in by the  
8 sex offender, including participation in treatment programs  
9 while incarcerated or elsewhere;

10 (4) the danger to the community posed by the  
11 sex offender; and

12 (5) a risk and needs assessment regarding the  
13 sex offender, developed by the sex offender management board of  
14 the New Mexico sentencing commission or another appropriate  
15 entity, to be used by appropriate district court personnel.

16 B. A district court shall review the terms and  
17 conditions of a sex offender's supervised probation at two and  
18 one-half year intervals. When a sex offender has served the  
19 initial five years of supervised probation, the district court  
20 shall also review the duration of the sex offender's supervised  
21 probation at two and one-half year intervals. When a sex  
22 offender has served the initial five years of supervised  
23 probation, at each review hearing the state shall bear the  
24 burden of proving to a reasonable certainty that the sex  
25 offender should remain on probation.

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1 C. The district court may order a sex offender  
2 placed on probation to abide by reasonable terms and conditions  
3 of probation, including:

4 (1) being subject to intensive supervision by  
5 a probation officer of the corrections department;

6 [~~(2)~~] ~~participating in an outpatient or~~  
7 ~~inpatient sex offender treatment program;~~

8 ~~(3)]~~ (2) a probationary agreement by the sex  
9 offender not to use alcohol or drugs;

10 [~~(4)~~] (3) a probationary agreement by the sex  
11 offender not to have contact with certain persons or classes of  
12 persons; and

13 [~~(5)]~~ (4) being subject to alcohol testing,  
14 drug testing or polygraph examinations used to determine if the  
15 sex offender is in compliance with the terms and conditions of  
16 his probation.

17 D. The district court shall order a sex offender  
18 placed on probation to participate in an outpatient or  
19 inpatient sex offender treatment program as a term and  
20 condition of probation.

21 [~~D.]~~ E. The district court shall notify the sex  
22 offender's counsel of record of an upcoming probation hearing  
23 for a sex offender, and the sex offender's counsel of record  
24 shall represent the sex offender at the probation hearing.

25 When a sex offender's counsel of record provides the court with

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1 good cause that the counsel of record should not represent the  
2 sex offender at the probation hearing and the sex offender is  
3 subsequently unable to obtain counsel, the district court shall  
4 notify the chief public defender of the upcoming probation  
5 hearing and the chief public defender shall make representation  
6 available to the sex offender at that hearing.

7 ~~[E.]~~ F. If the district court finds that a sex  
8 offender has violated the terms and conditions of his  
9 probation, the district court may revoke his probation or may  
10 order additional terms and conditions of probation.

11 ~~[F.]~~ G. As used in this section, "sex offender"  
12 means a person who is convicted of, pleads guilty to or pleads  
13 nolo contendere to any one of the following offenses:

14 (1) kidnapping, as provided in Section 30-4-1  
15 NMSA 1978, when committed with intent to inflict a sexual  
16 offense upon the victim;

17 (2) criminal sexual penetration in the first,  
18 second or third degree, as provided in Section 30-9-11 NMSA  
19 1978;

20 (3) criminal sexual contact of a minor in the  
21 second or third degree, as provided in Section 30-9-13 NMSA  
22 1978;

23 (4) sexual exploitation of children in the  
24 second degree, as provided in Section 30-6A-3 NMSA 1978; or

25 (5) sexual exploitation of children by

1 prostitution in the first or second degree, as provided in  
2 Section 30-6A-4 NMSA 1978. "

3 Section 3. EFFECTIVE DATE. --The effective date of the  
4 provisions of this act is July 1, 2005.

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